No. 603

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM L. BUCHNER, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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WILLIAM L. BUCHNER, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a) is not yet reported. The memorandum opinion of the district court denying petitioner's motion to suppress evidence (J.A. 6–11)[1] is reported at 164 F. Supp. 836.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1958. A petition for rehearing en banc was denied on November 24, 1958. The petition for a writ of certiorari was filed on December 24, 1958.

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether information leading to the issuance of the warrant was improperly obtained by a police officer.

2. Whether the trial judge correctly refused to submit to the jury the issue of whether evidence was obtained through wiretapping.

STATEMENT

Petitioner was convicted in the District Court for the District of Columbia on four counts of lottery operations in violation of 22 D.C. Code 1501, 1502, 1504 and 1505 (J.A. 1-2, 80). He was sentenced to six to eighteen months each on counts one and two, and six months each on counts three and four, all sentences to run concurrently (J.A. 13–14). The court of appeals affirmed *per curiam*.

Prior to trial, petitioner moved for return of seized property and suppression of evidence (J.A. 3–5). He alleged that as the occupant of an apartment he had an interest in the privacy of its hallways and approaches and that the police officer who had obtained the information leading to the issuance of the search and arrest warrants had trespassed upon this interest in that he entered the apartment building and listened to petitioner through the door of his third-floor apartment. The motion was denied, the district judge stating in a memorandum opinion that the case was distinguishable from *McDonald* v. *United States*, 335 U.S. 451, in that there was no forcible entry as in *McDonald*, and further citing cases to the effect that

even if a technical trespass had been committed it was not a violation of the Fourth Amendment (J.A. 6–11). At the trial petitioner renewed his objections before the first government witness was sworn (J.A. 19). He alleged at this stage that the action of the police officer was more than a technical trespass and constituted a misdemeanor of unlawful entry under 22 D.C. Code 3102 (Pet. 6a), and further that the police had tapped petitioner's telephone. After the first government witness was sworn, petitioner objected that the testimony he would give would be inadmissible since he was the police officer who had obtained the information leading to the issuance of the warrants (J.A. 21). The jury was excused at this point (J.A. 23).

Examination of the witness before the judge revealed that the police had received information on February 3 and 4, 1958, partly from a source proved reliable in the past, that a numbers racket was being conducted from a certain telephone number (J.A. 23). The number was checked and learned to be for a telephone in petitioner's apartment (J.A. 24–25). The witness went to the apartment house on February 6 and listened through the door to petitioner (later identified by his voice) talking on the telephone and taking bets (J.A. 25–26). The officer returned to the apartment on February 7, 8, 10, and 11, each time hearing petitioner taking bets over the telephone (J.A. 27–31). He had pressed his ear to the door of petitioner's apartment or kept within six inches of it when he overheard petitioner (J.A. 34–35). On February 12, he applied to the United States Commissioner for a search warrant and an arrest warrant, which were

executed the same day (J.A. 31). On cross-examination, the witness stated that he had been given no authority by anyone connected with the apartment building to enter the building (J.A. 32). On one or more occasions he entered an adjoining building and reached his destination through a connecting basement passageway (J.A. 32). He stated that he did not know how to tap a wire, and did not know of any wiretapping in conjunction with the case (J.A. 33–34). On redirect examination, the witness stated that he had seen some men in the basement who were apparently installing a telephone, and that he had seen a telephone truck parked outside the building (J.A. 36–37).

Petitioner then called the janitor of the building who testified that he had seen some men in the basement also, and that to the best of his knowledge no one had reported any telephone trouble (J.A. 38–39, 40). One of the men, with whom he talked, had two prongs with wires attached to the telephone box, and earphones (J.A. 39). On cross-examination, the janitor stated that he did not recognize any of the witnesses in the case as being among the men he had seen in the basement (J.A. 40). He did not know whether the men were hooked up to petitioner's phone or not (J.A. 41). Petitioner's motion for suppression was thereupon denied (J.A. 47).

When the jury was recalled, the police officer substantially repeated his testimony for the government (J.A. 47–55), and the janitor testified as a witness for petitioner (J.A. 62–65). Petitioner requested that an instruction be given to the jury that if they believed any of the evidence was obtained through the means

of tapping wires they were to find petitioner not guilty. The request was refused, the judge commenting that there was no evidence on the matter (J.A. 66).

ARGUMENT

1. The motion to suppress was properly denied because the evidence was seized under a search warrant which was valid and legal. Petitioner alleges that the information on which the search warrant was based was obtained by illegal action on the part of the police. He alleges in particular that the investigating officer was a trespasser when he overheard petitioner taking bets, through the door of his third floor apartment. However, the officer did not gain entrance to the apartment building by the use of force, as in *McDonald* v. *United States,* 335 U.S. 451. Petitioner's assertion must therefore rest upon the broad grounds that the officer committed a trespass when he entered the apartment building. To state the problem is very nearly to answer it. The common hallways and entrances of a large apartment building are accessible to the general public. That the owner of the building may, for the convenience and security of his tenants, take steps to keep out undesirable persons is of no help to petitioner here since there is no showing of any such steps taken by the owner. Any assertion that petitioner, had he known of the officer's presence, would have tried to have him barred, in effect a constructive prohibition, would appear to be of no more significance in this type of a case than the doctrine of trespass *ab initio,* uniformly rejected by this Court as a basis for challenging the admission of evidence.

McGuire v. *United States*, 273 U.S. 95; *On Lee* v. *United States*, 343 U.S. 747, 752. Moreover, even if there had been a technical trespass, it is the import of these and related cases that the protection of the Fourth Amendment extends to cases of substantial intrusions into "The right of the people to be secure in their persons, houses, papers, and effects * * *" and not to mere technical violations of the laws of civil trespass. *Hester* v. *United States*, 265 U.S. 57, 59; *On Lee* v. *United States*, *supra*. Particularly should this be so where there was no search conducted at that time, but only later, when a warrant was issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Petitioner's contention that the officer violated the provisions of the District Code relating to unlawful entry is similarly without substance. The question is solely one of local law, and both courts below apparently concluded that there was no violation. That there was no such violation is clear, moreover, from the very terms of the statute. The statute forbids entry into a building "against the will" of the owner or occupant (22 D.C. Code 3102, Pet. 6a). Since entrance to the apartment building was open to the general public without restriction, some showing of a specific intent to exclude police officers would be required, and none was made. While the police officer could perhaps have reasonably inferred that petitioner would not want him to be in the building, a single tenant of a large apartment building obviously cannot be said to "own" or "occupy" the entrance and hall-

ways to which he has only a limited right of use. Entrance into such an area could violate § 3102 only if "against the will" of the landlord, and there was no manifestation of any such intent by the landlord.

2. Petitioner's argument that the question of wiretapping should have been left to the jury overlooks the clear dictates of the two *Nardone* cases. The question concerns the admission of evidence or its exclusion. *Nardone* v. *United States*, 302 U.S. 379, 380. The proper procedure to be followed when a defendant wishes the judge to pass on the admissibility of evidence allegedly so obtained is outlined in *Nardone* v. *United States*, 308 U.S. 338, 341–342. There is no warrant in law for submitting such an issue to the jury. And here, as the district judge pointed out, there is no evidence of wiretapping by the government. Finally, petitioner points to no evidence that could have been the fruits of the alleged wiretapping. To the contrary, his own claims show that at the date of the alleged taps the police officer had already overheard petitioner taking bets through the door of his apartment and that the warrants were issued on the basis of that evidence.

CONCLUSION

There was no error in overruling petitioner's motion to suppress. It is respectfully submitted that the petition for a writ of certiorari be denied.

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